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NG PAK MEI v. SIERRA DELIMA DEVELOPMENT SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
MARY LIM JCA
HAS ZANAH MEHAT JCA
B VAZEER ALAM MYDIN MEERA JCA
[CIVIL APPEAL NO: B-02(NCVC)(A)-496-03-2019]
13 FEBRUARY 2020

C ***CONTRACT:*** *Sale and purchase agreement – Housing developers – Deed of novation – Whether novatee stepped into shoes of original purchaser – Whether novatee entitled to rights, title and interest pursuant to sale and purchase agreement – Whether Housing Development (Control and Licensing) Act 1966 applicable to purchaser as being novatee of deed of novation – Whether developer could subject land to any encumbrances without prior consent of purchasers – Whether agreement* D *between developer and contractor in creating charge in favour of contractor unlawful, illegal and void – Whether there was contravention of reg. 11 of Housing Development (Control and Licensing) Regulations 1989*

LAND LAW: *Housing developers – Sale and purchase agreement – Deed of novation – Whether novatee stepped into shoes of original purchaser – Whether* E *novatee entitled to rights, title and interest pursuant to sale and purchase agreement – Whether Housing Development (Control and Licensing) Act 1966 applicable to purchaser as being novatee of deed of novation – Whether developer could subject land to any encumbrances without prior consent of purchasers – Whether agreement between developer and contractor in creating charge in favour of contractor unlawful,* F *illegal and void – Whether there was contravention of reg. 11 of Housing Development (Control and Licensing) Regulations 1989*

The appellant was one of the purchasers of a parcel in the housing development on land belonging to the first respondent ('the project') by virtue of the deed of novation dated 3 September 2018 ('deed of novation') G with the original purchasers. The original purchasers had entered a sale and purchase agreement ('SPA') with the first respondent. To settle unpaid construction costs, the first respondent entered into a settlement agreement with the second respondent, the contractor for the project, dated 6 July 2017. Pursuant to the settlement agreement, the charge was created in favour of the H second respondent. It was a fact that the deed of novation was entered after the charge was created. At the High Court, the appellant sought a declaration that the charge and the lien holder's caveat (collectively referred to as 'the charge') entered in favour of the second respondent were unlawful and void as it had contravened the provisions of reg. 11 of the Housing Development

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(Control and Licensing) Regulations 1989 ('Regulations 1989') made under the Housing Development (Control and Licensing) Act 1966 ('HDA'). The High Court found that the appellant had acquired her interest as a new purchaser by virtue of the deed of novation after the creation of the charge and therefore, reg. 11 did not apply to the appellant and there was no breach of the regulations by the respondents. The High Court thus dismissed the appellant's application. Hence, this appeal. The issues that arose were (i) the issue of *locus standi* and whether the HDA was applicable to the appellant as being the novatee of the deed of novation; and (ii) whether the breach of the SPA in not obtaining the consent of the purchasers to create the charge had any bearing on the legality of the charge.

Held (allowing appeal)
Per Has Zanah Mehat JCA delivering the judgment of the court:

(1) Clause 2 of the deed of novation stipulates that a novatee shall be entitled to all whatsoever rights, title and interest pursuant to the sale and purchase agreement as if the novatee is the original party thereto in place of the novator. By virtue of this deed of novation, the appellant stepped into the shoes of the original purchaser and received all benefits and assumed all liabilities under the SPA. As such, regardless of the date of the deed of novation, parties are still bound by the SPA and the HDA and regulations made thereunder. (para 4)

(2) Section 24 of the HDA confers on the Minister powers to make regulations for the purpose of carrying into effect the provisions of the HDA, resulting in reg. 11 of Regulations 1989 being made. Regulation 11 provides that every contract of sale where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H. Therefore, cl. 3 of the SPA (which is the standard form contract prescribed by Schedule H) requires mandatory conformity by the parties. The legislative intent in the said cl. 3 which binds the affected parties makes it clear that the developer shall not, at any time after the execution of the SPA, subject the land to any encumbrances (in the present case the creation of the charge) without the prior consent of the purchasers where parties are not allowed to depart from. In this regard, it was not a matter of dispute by the respondents that no such consent was obtained from the original purchasers prior to the creation of the said charge. The non-compliance of cl. 3 of the SPA was not merely a breach of the sale and purchase agreement but also constituted a breach of the statutory requirements. (paras 5 & 6)

(3) The agreement between the first and second respondents in creating the charge, in absence of the prior consent of the original purchasers in the SPA (which was subsequently novated to the appellant), was of such a nature, if permitted, would defeat the purpose of the HDA, in particular Schedule H, that was to clothe the purchasers with the required protection from unscrupulous property developers as envisaged by the legislators. That said, the creation of the charge in such manner as in the appeal herein would render the charge unlawful, illegal and therefore void. (para 10)

Case(s) referred to:

Bodco Engineering And Construction Sdn Bhd v. Tribunal For Housing Purchaser Claims & Ors [2018] 6 CLJ 36 CA ***(refd)***

Foong Seong Equipment Sdn Bhd v. Keris Properties (PK) Sdn Bhd & Another Appeal [2011] 4 CLJ 1 FC ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd; Bhagat Singh Surain Singh & Ors (Interveners) [1996] 4 CLJ 52 HC ***(refd)***

Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd [1982] 1 LNS 81 HC ***(refd)***

SEA Housing Corp Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 24(b)

Housing Development (Control and Licensing) Act 1966, s. 24

Housing Development (Control and Licensing) Regulations 1989, reg. 11, Schedule H

Other source(s) referred to:

Salleh Buang, *Malaysian Law on Housing Developers,* 2nd edn, 2002, pp 7, 8

For the appellant - Kam Pei Yee & Angie Yoo; M/s David Lai & Tan

For the 2nd respondent - Siew Yew Ming & Chan Mun Fei; M/s Raja Eleena Siew Ang & Assocs

[Editor's note: Appeal from High Court, Shah Alam; Originating Summons No: BA-24NCVC-1179-09-018 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Has Zanah Mehat JCA:

[1] Having considered parties' submissions, both oral and written record of appeal and the grounds decision, we have now reached our decision. The following are our brief reasons.

[2] In the High Court, the appellant sought a declaration that the charge and the lien holder's caveat (collectively referred as "the charge") entered in favour of the second respondent are unlawful and void as it had contravened the provisions of reg. 11 of the Housing Development (Control and

Licensing) Regulations 1989 (PU(A) 58/1989) ("Regulations 1989"), made under the Housing Development (Control and Licensing) Act 1966 ("HDA"). His Lordship dismissed the appellant's application.

[3] The appellant is one of the purchasers of a parcel in the housing development on land belonging to the first respondent ("the project") by virtue of the deed of novation dated 3 September 2018 ("deed of novation") with one Gurdip Singh and Harjender Kaur ("the original purchasers") executed with the consent of the first respondent. The original purchasers had entered a SPA with the first respondent. It is not disputed that the SPA is subject to the HDA. The second respondent is the contractor for the project. To settle unpaid construction costs, the first respondent entered into a settlement agreement with the second respondent dated 6 July 2017. Pursuant to the settlement agreement, the charge was created in favour of the second respondent. It is a fact that the deed of novation was entered after the charge was created.

[4] First we will answer the issue on *locus standi* and whether the HDA is applicable to the appellant as being the novatee of the deed of novation. His Lordship's finding is that the appellant acquired her interest as a new purchaser by virtue of the deed of novation dated after the creation of the charge. Therefore, reg. 11 does not apply to the appellant and there was no breach of the regulations by the respondents. We disagree with His Lordship. It is clear under cl. 2 of the deed of novation which stipulates that the novatee shall be entitled to all whatsoever rights, title and interest pursuant to the sale and purchase agreement as if the novatee is the original party thereto in place of the novator. By virtue of this deed of novation, the appellant steps into the shoes of the original purchaser and receives all benefits and assumes all liabilities under the SPA. As such, regardless of the date of the deed of novation, parties are still bound by the SPA and the HDA and regulations made thereunder.

[5] On the second issue, whether the breach of the SPA in not obtaining the consent of the purchasers to create the charge has any bearing on the legality of the charge, His Lordship answered this in the negative. With respect we disagree with His Lordship. Section 24 of the HDA confers on the Minister powers to make regulations for the purpose of carrying into effect the provisions of the HDA, resulting in reg. 11 of Regulations 1989 being made. Regulation 11 provides that every contract of sale where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form

prescribed in Schedule H. Therefore, it is our considered view that cl. 3 of the SPA (which is the standard form contract prescribed by Schedule H) requires mandatory conformity by the parties. The legislative intent in the said cl. 3 which binds the affected parties makes it clear that the developer shall not at any time after the execution of the SPA, subject the land to any encumbrances (in the present case the creation of the charge) without the prior consent of the purchasers where parties are not allowed to depart from. In this regard, it is not a matter of dispute by the respondents that no such required consent was obtained from the original purchasers prior to the creation of the said charge.

[6] Consequently, it is our considered view that the non-compliance of cl. 3 of the SPA is not merely a breach of the sale and purchase agreement but would also constitute a breach of the statutory requirements. We find support in *Bodco Engineering And Construction Sdn Bhd v. Tribunal For Housing Purchaser Claims & Ors* [2018] 6 CLJ 36; [2017] 4 MLJ 501; and *Foong Seong Equipment Sdn Bhd v. Keris Properties (PK) Sdn Bhd & Another Appeal* [2011] 4 CLJ 1; [2013] 2 MLJ 361 at para. [21].

[7] In *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd; Bhagat Singh Surain Singh & Ors (Interveners)* [1996] 4 CLJ 52; [1996] 2 MLJ 431 it was held that, a court will not enforce a contract which is expressly or impliedly prohibited by statute.

[8] It is trite that an agreement in contravention of written law is unlawful or illegal as can be seen in s. 24 of the Contracts Act 1950 (Revised 1974, Act 136), where in s. 24(b), it contains clear provisions that the consideration or object of an agreement is lawful, unless it is of such a nature that, if permitted, it would defeat any law.

[9] The housing legislation is primarily aimed at, amongst others, protecting the interests of purchasers to counter the economic and bargaining power imbalance of the parties (see *Malaysian Law on Housing Developers*, 2nd edn. by Salleh Buang, 2002, pp. 7 and 8; *SEA Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305, per Suffian LP; and *Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd* [1982] 1 LNS 81; [1983] 1 MLJ 335, at p. 341, per George J (later JCA)). The HDA is a piece of social legislation; hence its provisions should be given a liberal and purposive interpretation ie, to promote the general legislative purpose underlying the provisions.

[10] We, therefore conclude in our determination that the agreement between the first respondent and the second respondent in creating the charge in absence of the prior consent of the original purchasers in the SPA (which was subsequently novated to the appellant) is of such a nature, if permitted, would defeat the purpose of HDA, in particular Schedule H, that is to clothe the purchasers with the required protection from unscrupulous property developers as envisaged by the legislators. That said, the creation of the charge in such manner as in the appeal before us would render the charge unlawful, illegal and therefore void.

[11] Premised on the foregoing reasons, we are inclined to allow the appeal and consequently all prayers in the originating summons are allowed. The High Court order dated 20 February 2019 is set aside. Costs subject to payment of allocator to the appellant.